



Early Journal Content on JSTOR, Free to Anyone in the World

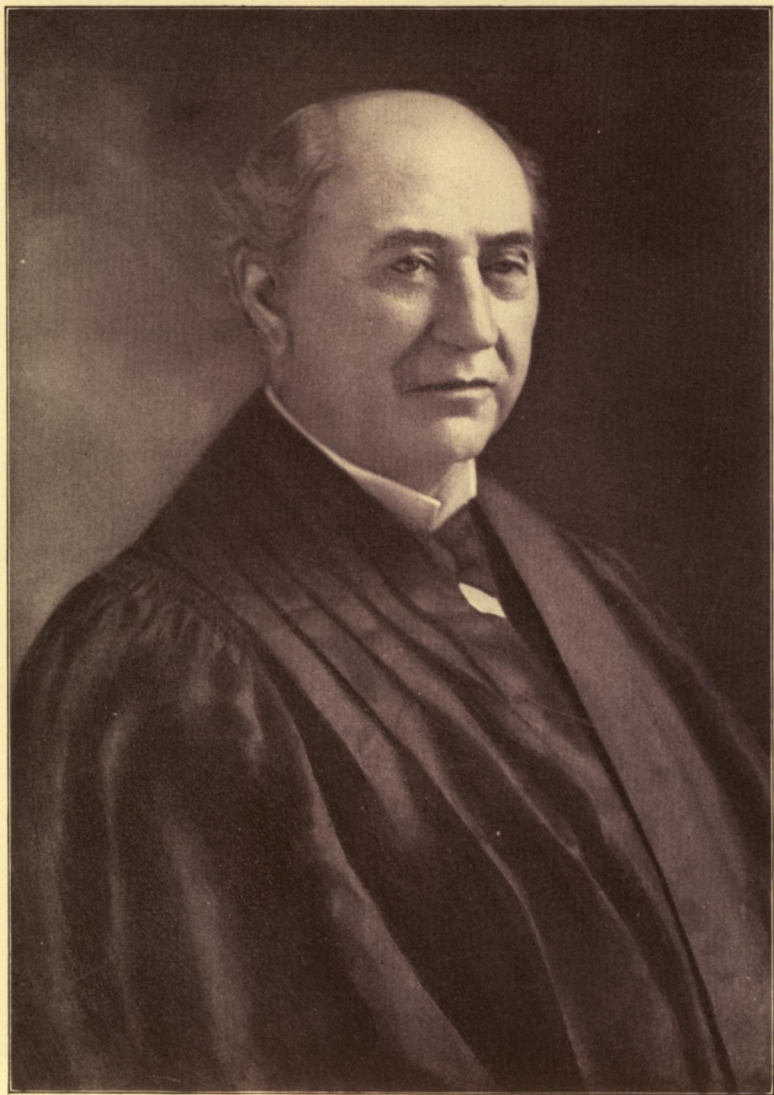
This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.



David J. Brewer

NORTH AMERICAN REVIEW

No. DCXXVI.

JANUARY, 1908.

THE GREAT MINDS OF AMERICA.

III.—DAVID J. BREWER.

THE REVIEW is considering some of the greater of living men who, actually and potentially, are valuable to us, valuable as citizens who give to the public the best they have. The most beneficent power that any man possesses, as Justice Brewer has said in one of his many addresses to the young men of our schools, is brain power. We do not mean, by brain power, mental activity expressed in a rapid procession of intellectual impressions, manifestations that are as quick as the shuttles which weave the perishable cloth; we mean the slow and patient power of the discoverers and the defenders of truth; of the scientists who search and find the everlasting secrets of nature; of the philosophers who compose great pictures of the universe; of the publicists who deal with men and their governments in the simple ways of greatness, whose very simplicity leads to criticism of them by men to whom quiet often denotes inefficiency, publicists who know the impotence as well as the value of human laws, who never forget that the law of nature is unrepeatable by statutes, that the greatness of a state is to be found in the minds and characters of its citizens, and that its material expansion is often far from being a blessing.

We present in this number Justice Brewer, of the United States Supreme Court, as one of the men of our time of great intel-

VOL. CLXXXVII.—NO. 626. 1

Copyright, 1907, by THE NORTH AMERICAN REVIEW PUBLISHING COMPANY. All Rights Reserved

lectual power, a power which he employs in his important place and out of it for the advancement of the public welfare. In his place his words often determine the law; out of it they are the words of a thoughtful and wise citizen, and, therefore, they sink deep into the minds of serious men. Their influence may not be immediately felt, for the truth is often disregarded, while the sham triumphs, for the moment, among the thoughtless and the over-excited; but, in the end, the truth prevails simply because it is the truth. The men who utter words of wisdom, which are always words of truth, do not often occupy the first political places in a republic, as President Eliot has pointed out; but one of them will perform more lasting beneficent service, will do more to direct the thoughts of his fellows, and thus more to mould the institutions of the country, than all the place-holders of his time.

Justice Brewer has spoken and written upon a variety of topics, but we will concern ourselves in this brief article with his judicial contributions to the law of the Constitution, with his views of the relations that ought to exist between the general Government and the States, and with the advice which he has given to lawyers, young and old, fresh from the schools or experienced in practice.

Lawyers, in his mind, should be, as they have almost always been, the leaders of the people. We shall define this to mean the leaders in the making and executing as well as in the interpretation of laws. This is saying simply that the work of governing, in all its branches, should be performed by trained minds. Acuteness is not enough; quickness of apprehension is not sufficient, nor is the experience of a single life. The arts of party management will not satisfy the needs and demands of government. In the practice of such arts Disraeli dominated Gladstone, and Burr was master of both Jefferson and Hamilton. The difference between the two classes is marked by the shifty means for immediate ends of the one and the deep conviction and moral purpose of the other. Justice Brewer thinks of the lawyer who, like himself, makes and executes and interprets the law for the doing of justice as justice is done, roughly enough, it may be true, but still honestly and righteously by trained men who know how law has grown from the sources, whose experience is that of the long centuries during which this growth has been made, who

are, therefore, familiar with the need of consistent and enduring, as well as practical, rules for the guidance of human conduct and for the remedying of ills that affect the state. The lawyers, he will say, made and interpreted the Constitution; built up our federal system; and, as a class, they alone have the knowledge that is essential to the successful working of the state they have constructed. There are others than lawyers, of course, who have been distinguished and useful statesmen. In England, for example, there is a class besides, and, in some respects, better trained than lawyers for their tasks; but in this country the lawyers are the only class of men who necessarily are learned in the art of legislation; there are other statesmen than lawyers, but there is no other single class to which we may go for statesmen. The other statesmen, however, would not be fit for their tasks if they did not recognize the value of expert assistance; the President who is a layman and who would be his own lawyer, draw his own bills, insist upon his own interpretation of the Constitution and the laws against the advice of the experts, or in contradiction of them, would not be one of the worthy exceptions to whom allusion has been made.

Admitting that Justice Brewer is correct, and that, in this republic at least, the community will naturally look to the lawyer for leadership, what are the teachings of this member of the profession, of this influential justice of our highest court?

In the first place, he has spoken more upon the duties of his profession and upon the duties of citizenship than any other justice during the century and more of the court's existence; moreover, in his addresses, he has been as free from partisanship as he has been in his judicial opinions, one of which at least is worthy of Chief-Justice Marshall in his best days.

Then we come to the teachings themselves. There has been a theory held, and recently advanced, that the Constitution is changeable, or developing, and that, in interpreting it, the court must obey the behests, or yield to the temper, of the time. This is the crude expression of a mind which misunderstands a truth. The Constitution does, indeed, develop; but its growth comes by the application of its fundamental and unchanging principles to new conditions made by the advance of commerce, of arts, of invention, to improved, and constantly improving, social conditions. If the Constitution be, indeed, changed in any respect, it

must be done by amendment. Justice Brewer recognizes the influence of the thought of the people upon the Supreme Court in this kind of development; it is the influence of the age upon the thoughts of judges as well as of other men; but the thought that moves so vitally is not a disputed thought, especially a thought that is the subject of partisan debate; it is the deliberate thought of the whole people, the spirit of the age. It is best illustrated by the history of the interpretations of the commerce clause. In the earlier day, the court announced that navigation was commerce; in the later day, it included railroads, telegraphs, and all the modern instrumentalities of intercourse. One class of men would have the court change the commerce clause in order to bring production within the regulating power of the Federal Government, or to transform regulation into complete control. To accomplish this by judicial construction would be to violate the Constitution, and to recognize the violation as an acceptance of the popular thought, while in fact it would be a dishonorable yielding to the loud demands of a faction.

In his address before the Virginia State Bar Association, which was delivered in 1906, Justice Brewer called attention to the theory advanced by the President and by Mr. Root, that the meaning of the Constitution could be changed by judicial construction; in other words, that it might be amended by the Supreme Court, which, under Marshall, had constituted itself, and since has been accepted, as the defender of the Constitution against the possible encroachments of the political power. Here was offered a great opportunity to such a man as Justice Brewer, and his reply was crushing, for he demonstrated that the adoption of such a heresy would destroy the Federal Government, would transform it into a national republic like France, for example, putting to death the Constitution, while the Government of enumerated powers would become a "government with all the powers vested in the legislative and executive authorities of the nation; and the Tenth Amendment, which reserves to the people what they have not in terms granted, would become a voiceless and unmeaning part of the Constitution."

Clearly and convincingly he has taught those who have listened to him and heeded him that the national power has been expanded as greatly as it ought to be. Throughout the two periods of our constitutional history—that before the War of Secession,

in which the national stability was established, and that after the war, when, by the adoption of the amendments, especially the Fourteenth Amendment, the national power was enormously expanded—the Supreme Court has been the brake upon the Government wagon, holding back the political power from obtaining its partisan or personal ends, or from gratifying its notions through violation of the Constitution, or through pretending to read into its provisions meanings that are not there.

Justice Brewer, then, believes in the Federal Government, partly because he has respect for the laws—the law of the Constitution being higher to him than the law of the statutes or the whims of an Executive—and partly because he thinks that the federal system is essential to the good government, and, therefore, to the happiness of the country. He believes that the remoteness of a Central Government from the people would put an end to their vigilance, and would, therefore, eventually deprive them of that political instinct which exists only among those who exercise political power and discharge political duties. He condemns the growing habit of appealing to the National Government for relief against ills that should be borne, or when remedied should be corrected by the community immediately injured. He has no respect for the dominating idea that efficiency is the sole standard for a republican, or democratic, government, for, he says, if efficiency is the only test, “then a centralized government with a dictator is the ideal government.” In illustration of the tendency of the time towards centralization, he recalls recent incidents at Washington,—the swinging of the Executive whip, for example, over the House of Representatives in order to compel the passage of a Statehood bill, an activity quite in keeping with the supremacy of the party boss and the party machine. The “most glorious product of our civilization,” he says, “is not the entrancing beauty of the Capitol, the magnificence, wealth or extravagance of the Government, its ironclads or its army, its wonderful system of railroads, its marvellous manufacturing, mining and other interests, but rather the individual’s possession of an independent, conscientious, public-spirited citizenship.” He warns us, too, against proposed further encroachments upon the powers and functions of the State for the increase of the federal powers, with the consequent degradation of the individual.

The proper control of government by the people is necessarily postulated on the maintenance of local power in the people. This is the central thought that lies at the foundation of his reasoning about the relative powers and places of the Nation and the State. To thousands of young men he has imparted golden lessons, in which is recognized the divine worthiness of the individual, for his insistence upon the dominance of the State over its affairs, the control of the city over its interests, follows from his conception that the man is the father of the State; that the State exists for him, not he for the State; that the value of the State depends upon the jealousy of the citizen for his own rights, his observance of his political duties, while his civic manliness depends upon his refusal to lean upon the State as paternalism would have him lean. The welfare of individuals is not dependent upon uniformity of habits, neither is the welfare of the States dependent upon uniformity of laws regulating their domestic concerns. Each community should be free to judge of its own needs, of its own desires, and the nation should be confined to the care of the common interests. The moral and mental vigor of the citizen should not be allowed to become debilitated by a paternalism which relieves him of the need of watchfulness, of industry, of thought. These are a few of the teachings of one of the foremost minds in the country. As a judge, speaking for the whole court, in *Kansas vs. Colorado*, recently decided, Justice Brewer defined the freedom of the States from the control of the Federal Government, and its own sovereignty over its affairs, in an opinion which, as we have already said, is worthy of Chief-Justice Marshall. As a citizen, he has spoken many times for the manhood of the individual which has been, and continues to be, threatened by an enervating paternalism. Long after impressions made in haste or in excited moments have been effaced, or are remembered with bitter self-reproaches by those who heeded them to their own and, perhaps, to the community's harm, the words of Justice Brewer will be accepted as truths uttered by a man of a careful, trained and thoughtful mind.